

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

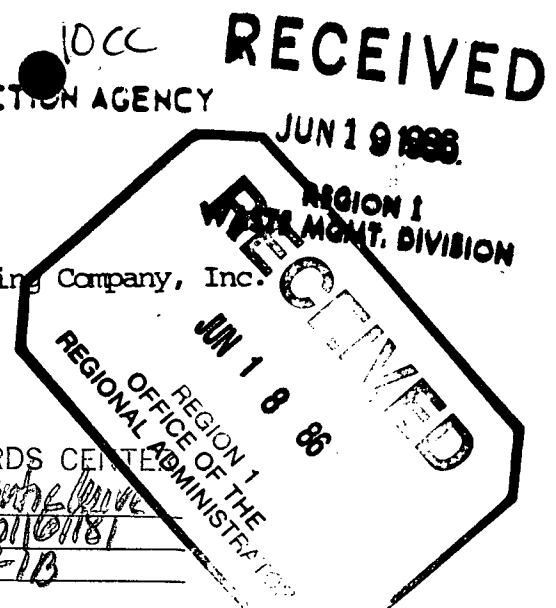
DATE: JUN 13 1986

SUBJECT: Decision by Judge Thomas Yost in Brown Wood Preserving Company, Inc.

FROM: Regional Administrator, Region IV

TO: J. Winston Porter
Assistant Administrator for OSWER (WH-562A)

RCRA RECORDS CENTER
FACILITY: Atlanta, Ga
I.D. NO.: 010001101181
FILE LOC.: R-1B
OTHER: _____



The enclosed decision includes many conclusions which contradict the agency's position in many RCRA enforcement actions nationwide. Further, the decision includes language which suggests that EPA may be prohibited from initiating such actions in many circumstances. For example, within this decision, Judge Yost states:

1. The July 25, 1984, and November 23, 1984, "Skinner memoranda," in which John H. Skinner, OSW, answered questions raised by James H. Scarbrough of Region IV regarding the regulation of K001 and F006 wastewater treatment sludges, extended the realm of regulated facilities and were therefore in violation of the Administrative Procedure Act (APA) which requires that such pronouncements be subject to publication, comment and final promulgation in the Federal Register. Likewise, the Judge states, the agency's attempted use of the memoranda to support its enforcement action violated the APA.
2. The Background Document for the listing of K001 sludge lacked the precision and completeness necessary to put the wood preserving industry on notice that holding ponds and spray irrigation fields such as those at the Brown Wood facility were subject to RCRA regulation.
3. The Judge also followed the decision in the U.S. Nameplate Company case in finding that the K001 Background Document should have been published in the Federal Register and that absent such publication, the document could not be used to support the EPA enforcement action.
4. The Judge also found that the EPA did not meet its burden of proof because of its failure to demonstrate that the theory in the "Skinner memoranda" regarding the generation of sludge in wastewater treatment units is grounded in fact and supported by scientific data. Further, the Judge attached weight to the fact that witnesses for Brown Wood, and the American Wood Preservers Institute, disputed the theory set forth in those memoranda.

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5. The Judge disagreed as well with the agency's interpretation of the definition of a "tank" set forth at 40 C.F.R. §260.10, and found that a device buried in the ground consisting of four wooden sides and a clay bottom met that definition.

At this time, Region IV is evaluating whether to appeal this decision to the Administrator. In the interim, it is imperative that the regions immediately receive clear guidance on whether and/or how to proceed with regulatory determinations and enforcement actions in situations where reliance upon background documents, internal memoranda, etc., is necessary.

I recommend that in addition to such interim guidance, you take immediate steps to publish all relevant guidance, interpretive memos, etc., in the Federal Register with a clear statement as to the effective date of such documents.


Jack E. Ravan

Enclosure

cc: OGC (LE-130)
RA's, Regions I-III, V-X
Marcia Williams (WH-562)
Gene Lucero (WH-527)